

No. 86-1337

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

W. T. "BUTCH" BURNS, et. al.,
Petitioners

v.

DELMAR-WEST LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et. al.,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

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March, 1987

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STATEMENT OF THE QUESTIONS PRESENTED

1. WHETHER A SINGLE JUDGE HAS AUTHORITY TO DISMISS A MERITLESS COMPLAINT WHICH FAILS TO STATE A CLAIM UNDER THE VOTING RIGHTS ACT.
2. WHETHER THE COMPLAINT STATES A CAUSE OF ACTION UNDER THE VOTING RIGHTS ACT AND THE FIFTEENTH AMENDMENT.
3. WHETHER THE COMPLAINT STATES A CAUSE OF ACTION IN REGARD TO THE CONSTITUTIONALITY OF TEX. REV. CIV. STAT. ANN. ART. 717m-1, SECTION 8.

LISTING OF PARTIES

W. T. "Butch" Burns, Ted Carrington, Dwight Stegall,
Roy L. Turner, Eddie L. Sams — Plaintiffs/Appellants/
Petitioners

Frank D. Moore — Attorney for Plaintiffs/Appellants/
Petitioners

Delmar-West Lamar Consolidated Independent School Dis-
trict and the members of its Board of Trustees (now known
as the Chisum Independent School District) — Defendants/
Appellees/Respondents

John Brooks, Superintendent of Schools, and the members
of the Board of Trustees of the Delmar Independent School
District — Defendants/Appellees/Respondents

Maury Winnie, Superintendent of Schools, and the mem-
bers of the Board of Trustees of the West Lamar Indepen-
dent School District — Defendants/Appellees/Respondents

Mary Milford of the Law Offices of Earl Luna, P.C. —
Attorney for Defendants/Appellees/Respondents

The Honorable Jim Mattox, Attorney General of the State
of Texas — Intervenor

Deborah Herzberg Loomis, Susan Lee Voss and Leroy
Grawunder — Assistant Attorneys General

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On Petition for Writ of Certiorari to the
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**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioners seeking review of the Judgment in the United States Court of Appeals for the Fifth Circuit which affirmed the Judgment of the United States District Court for the Eastern District of Texas, Paris Division.

STATEMENT OF THE CASE

Petitioners are attacking the propriety of the District Court's Order of March 5, 1986, which dismissed two consolidated cases¹ for failure to state a claim upon which relief can be granted and which was affirmed by the Fifth Circuit Court of Appeals on November 12, 1986. Neither opinion was published. The District Court's Order is reprinted as Appendix A and the Fifth Circuit Judgment is reprinted as Appendix B.

These cases involve two elections held by the Defendant school district and also involve two consolidated state court cases and a state administrative agency proceeding.

On February 11, 1986, Petitioners Burns, Carrington and Stegall filed the first suit and application for a temporary restraining order in federal court, being Cause No. P-86-10-CA, styled *W. T. "Butch" Burns, et. al., v. Delmar-West Lamar Consolidated Independent School District*. (Tr. Vol. 1, p. 1). This Complaint alleges the following facts:

On August 10, 1985, the Delmar Independent School District and the West Lamar Independent School District each held separate elections which resulted in the two school districts forming a single consolidated school district — the Delmar-West Lamar Consolidated Independent School District.² Two days later, on August 12, 1985, Petitioners, who are residents of the Lake Creek community, commenced

¹*W. T. "Butch" Burns, et. al. v. Delmar-West Lamar Consolidated Independent School District*, Civil Action No. P-86-10-CA, filed February 11, 1986, and *W. T. "Butch" Burns, et. al., v. Delmar-West Lamar Consolidated Independent School District*, Civil Action No. P-86-14-CA, filed February 21, 1986.

²By resolution of the Board of Trustees of the Delmar-West Lamar Consolidated Independent School District dated August 21, 1986, the District was renamed Chisum Independent School District. Its territorial limits remain unchanged.

proceedings to deannex the territory in Lake Creek from the Delmar-West Lamar Consolidated Independent School District and attach that territory to the Cooper Independent School District. The Commissioners Court of the respective counties involved denied the deannexation petition. Petitioners appealed the denial to the Texas Education Agency requesting a hearing on the issue before that agency. (Tr. Vol. 1, pp. 2, 3).

On November 2, 1985, an election was held which approved the issuance of \$2,500,000.00 worth of bonds by the Delmar-West Lamar Consolidated Independent School District for purposes of building a new high school. The vote was 309 in favor of the bonds and 211 against the issuance of the bonds. Passage of the bond issue raised a distinct threat to Petitioners' deannexation proceeding. In order to be annexed to the Cooper Independent School District, that school district must agree to receive the territory, which Cooper Independent School District is willing to do unless the territory involved becomes encumbered with debt attributable to the repayment of the bonds if they are sold. Therefore, Petitioners must complete the deannexation procedures prior to the bonds being sold or their territory will not be accepted by the Cooper Independent School District. (Tr. Vol. 1, pp. 3, 5).

Since the appeal to the Texas Education Agency of the Commissioners Court's denial of the deannexation petition would take longer than it would for the Delmar-West Lamar Consolidated Independent School District to sell the bonds, Petitioners must delay the sale of the bonds. Petitioners filed an election contest of the bond election in state court, which has the effect of an injunction against the sale of the bonds until the litigation is terminated. The Delmar-West Lamar Consolidated Independent School District replied to

the election contest and also filed suit for a declaratory judgment to validate the bonds for sale pursuant to the provision of Tex. Rev. Civ. Stat. Ann. Art. 717m-1 (Vernon Supp. 1987). The election contest and the bond validation suits were consolidated.³ The school district then filed a motion to require Petitioners to post a bond to cover the damages, if any, which would be incurred by the school district due to the delay of the sale of the bonds because of the pending litigation which prevents their sale. (Tr. Vol. 1, p. 4). This bond is authorized by Tex. Rev. Civ. Stat. Ann. art. 717m-1, §8, *only* if the Petitioners were unable to show facts that would warrant the issuance of a Temporary Injunction against the sale of the bonds. (Art. 717m-1, Sec. 8 & Sec. 9 are reproduced in Appendix C.) A simple showing of a prima facie case by Petitioners would prevent a bond being required.

While the Complaint sought a Declaratory Judgment that Art. 717m-1 was unconstitutional and also alleged that neither the consolidated election of August 10, 1985, nor the bond election of November 2, 1986, had been cleared by the Justice Department, the relief requested was:

“ . . . to permanently enjoin the Defendants from further proceedings until the right to be deannexed is determined, that such statute be declared unconstitutional . . . ”

(Tr. Vol. 1, p. 9).

Petitioners specifically requested that the federal district court enjoin all further state proceedings, including the hearing on the bond set for February 13, 1986. (Tr. Vol. 1, p. 10).

³These suits have proceeded to a final judgment in favor of Respondents. *W. T. "Butch" Burns, et. al. v. Delmar-West Lamar Consolidated Independent School District*, 720 S.W.2d 836 (Tex. App. — Texarkana 1986, writ ref'd n.r.e.). However, the bonds still cannot be sold due to the pendency of this action.

On February 12, 1986, the Honorable William Wayne Justice, acting for Judge Brown in his absence, held an in-chambers conference with the respective attorneys. Judge Justice found that the consolidation election of August 10, 1985, was cleared on February 7, 1986, by the Justice Department, which did not interpose any objection. The bond election had not yet received clearance, therefore, Judge Justice restrained the school district from proceeding any further in the state court suits. (Tr. Vol. 1, p. 103). The Temporary Restraining Order was to remain in effect until a hearing set for February 21, 1986.

On February 21, 1986, a motion was made and granted allowing the State of Texas to intervene to defend the constitutionality of art. 717m-1. (Tr. Vol. 1, p. 116). Both the State of Texas and Defendants filed Motions to Dismiss and Answers on February 21, 1986. (Tr. Vol. 1, pp. 119, 139).

In open Court, during the hearing of February 21, 1986, counsel for Petitioners announced that he had another suit to file regarding these elections. (Tr. Vol. 3, pp. 6, 7). The second suit and Application for Temporary Restraining Order was filed on February 21, 1986, being Cause No. P-86-14-CA, also styled *W. T. "Butch" Burns, et. al., v. Delmar-West Lamar Consolidated Independent School District*. (Tr. Vol. 1, p. 254). Judge Brown continued the restraining order while he took the case under advisement. The two cases were ordered consolidated. (Tr. Vol. 1, p. 187).

The second suit was brought by the same Petitioners along with Roy L. Turner and Eddie L. Sams, against the consolidated school district, and against the previous superintendents and boards of trustees of the two schools which formed the new consolidated district. (Tr. Vol. 1, p. 254). This complaint alleged that it was brought pursuant to the

15th Amendment to the U.S. Constitution and 42 U.S.C. §1971, §1973(c). Essentially the complaint set forth the exact allegations in the state court election contest of the bond election regarding alleged violations of state law.

The relief requested was for the court to convene a three judge court; to declare both elections void for failure to secure clearance prior to the elections and for use of "voting procedure changes that promote discrimination"; for a temporary restraining order and for attorney fees. (Tr. Vol. 1, p. 10).

Defendants filed a Motion to Dismiss and Answer to the second complaint. (Tr. Vol. 1, p. 228). All motions were heard and ruled on by Judge Brown on March 5, 1986, who having found that both elections had been precleared without any objection, dismissed both complaints for failure to state a cause of action for which relief can be granted. (Tr. Vol. 1, p. 241).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THIS CASE DOES NOT INVOLVE ANY ISSUE OF NATIONAL IMPORTANCE WHICH NEEDS TO BE RESOLVED BY THIS COURT.

Petitioners' passing reference in their Brief (p. 18) to this case being of National importance is contradicted by the admitted fact that both elections were cleared without objection by the Justice Department prior to entry of the Order of dismissal in these cases and by the allegations in the complaints which were directed toward the deannexation issue rather than to any issue regarding denial of the right to vote.

The affidavits used to verify both complaints in this cause succinctly state the nature of these cases and are set forth herein in their entirety. The affidavit verifying the first complaint, Cause No. P-86-10-CA, found at R. Vol. 1, p. 10 reads:

AFFIDAVIT AS TO FACTS

My name is Ted Carrington, and I am one of the Petitioners in the suit to be filed in Federal District Court to enjoin the Delmar-West Lamar Consolidated Independent School District from continuing with their bond election, pending a final hearing by the Texas Education Agency and the Court of the State of Texas on the deannexation of the Lake Creek Community. I have been involved in the procedure to secure the deannexation from Delmar-West Lamar Consolidated Independent School District since its inception and I am thoroughly familiar with all of the facts therein. I have been told that if the School Bond Election is completed, there is a good possibility that the Cooper Independent School District will not accept the Lake Creek Community with that debt attached. I feel that unless the Bond Election is stopped, that irreparable harm will occur to me, it will deny me my rights under the Constitution and as a citizen of the United States. I have read the pleadings in this cause of action and those facts that are in regard to the deannexation and the school board actions are within my knowledge and are true and correct.

SIGNED this 10th day of February, 1986.

/s/

TED CARRINGTON

Ted Carrington

The verification of the second complaint, cause No. P-86-14-CA, at Vol. 1, p. 27 reads:

STATE OF TEXAS }
COUNTY OF DELTA }

BEFORE ME, the undersigned authority, on this day personally appeared DWIGHT STEGALL, one of the Defendants in the above mentioned cause of action, who being by me duly sworn upon his oath states, that he is one of the Petitioners in the above numbered and entitled cause and has read the foregoing Application for Temporary Restraining Order and Temporary Injunction to enjoin Defendants from conducting any further litigation and that every statement contained therein is true and correct.

/s/ DWIGHT STEGALL

Dwight Stegall

Obviously this case is solely a local fight over deannexation — not a Voting Rights case.

II. A SINGLE JUDGE DISTRICT COURT HAS AUTHORITY TO DISMISS A COMPLAINT, BROUGHT UNDER SECTION 5 OF THE VOTING RIGHTS ACT, THAT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

Only cases brought under Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c), are required to be heard by a three-judge panel. Cases brought under any other provision of the Voting Rights Act may be heard by a single judge. 42 U.S.C. §1973(c) requires that "any action under this section should be heard and determined by a court of three judges in accor-

dance with the provisions of section 2284 of Title 28." However, this requirement does not render a single judge court powerless in a Voting Rights Act case.

Procedurally, the single judge district court may make the determination regarding whether there is a Section 5 coverage question presented by the pleadings which would require a three-judge court and may also make the decision to dismiss a meritless claim. *U.S. v. Saint Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1979); *Backus v. Spears*, 677 F.2d 397 (4th Cir. 1982); *Webber v. White*, 422 F.Supp. 416 (N.D. Tex. — Ft. Worth, 1976); *Merced v. Koch*, 574 F.Supp. 495 (S.D. New York, 1983).

Authority to dismiss for failure to state a cause of action emanates from 28 U.S.C. §2284(3), which establishes the procedures to be followed by three-judge courts, by providing that:

A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection.

A dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is not a judgment on the merits and is clearly an "order permitted by the rules of civil procedure". Therefore, such an order may be entered by a single judge even though the provisions of Section 5 are involved. As with any lawsuit, merely alleging a violation of a statute is insufficient; all elements encompassing the offense must be adequately pled. *Webber v. White*, *supra*, 422 F.Supp. at 424-425.

The Fifth Circuit, in *U.S. v. Saint Landry Parish School Board*, *supra*, also reasoned that Supreme Court precedents regarding dismissal of insubstantial claims by a single judge in other three-judge cases would be equally applicable to the

three-judge requirement of the Voting Rights Act. Justice Goldberg stated at p. 863 of the *Saint Landry* opinion:

While it is true that coverage questions must be determined by a three-judge court, *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 830, 22 L.Ed. 2d 1 (1969), a three-judge court is not required if the claim is wholly insubstantial or completely without merit.

Appellees would submit that the question of a single judge's authority to dismiss a complaint, under Section 5 of the Voting Rights Act for failure to state a claim, has been well established.

An action brought by a private litigant under Section 5, 42 U.S.C. §1973(c), is of a very limited nature. The court's scope of inquiry is limited to whether or not the voting change is covered by Section 5 and if the change is covered, whether the Section 5 requirements were satisfied by submission to the Justice Department for clearance or by an action for declaratory judgment in the District Court of the District of Columbia. *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817 (1969); *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971).

If the District Court determines that a voting change is within the purview of Section 5, then it may issue an injunction against enforcement of a State enactment until the State has properly submitted the change under the Act and may order the State to submit the change within a prescribed time period. *National Association for the Advancement of Colored People v. Hampton County Election Commission*, ____ U.S. ____, 105 S.Ct. 1128 (1985).

In the present case there is no dispute that the consolidation election was cleared, without objection, by the Justice Department by the letter dated February 7, 1986, and the

bond election was also cleared, without objection, by letter dated March 7, 1986. (Tr. Vol. 1, pp. 237, 239, 246, 247). (Pet. Brief, p. 17).

Once the State has successfully complied with the Section 5 submission and approval requirements, there is no further action or remedy provided for by Section 5. *Allen v. State Board of Elections*, supra, 393 U.S. at 549-550, 89 S.Ct. at 823; *Perkins v. Matthews*, supra, 400 U.S. at 396-397, 91 S.Ct. at 441. Having received approval, the school district is in the posture set forth in *Berry v. Doles*, 438 U.S. 190, 193, 98 S.Ct. 2692, 2694 (1978):

If approval is obtained, the matter will be at an end.

Petitioner's Complaints allege that neither election was precleared; however, in this Petition for Certiorari the argument changes to one that there was an incomplete submission, thereby rendering the clearance ineffective. This argument is neither raised nor supported by the record. This is an argument improperly raised for the first time on appeal. *Matter of Novack*, 639 F.2d 1274 (5th Cir. 1981).

Petitioners allege that the consolidation was not approved, however, the February 7, 1986, letter from the Attorney General clearly states:

"This refers to the consolidation of the Delmar and West-Lamar Consolidated Independent School Districts . . ."

The elimination of one of the absentee polling places, and the use of a non-resident absentee voting clerk were submitted and cleared by the Justice Department (Tr. Vol. 1, p. 230, 237).

Equally plain on its face is the fact that state statutory requirements regarding posting notices for school board

meetings do not in any manner involve a "standard, practice or procedure" with respect to voting.

The remaining allegations regarding items which allegedly should have been cleared involve allegations of violations of the Texas Election Code, which even if they were true, do not present a Section 5 coverage question. *United States v. Saint Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1979), decided the exact question which involved a vote-buying scheme carried out by the three *official* poll commissioners. The Court of Appeals upheld the District Court's dismissal of the government's complaint on the basis that election fraud did not constitute a "procedure susceptible of approval" under Section 5, stating at p. 863 of the opinion:

The approval requirements of Section 5 apply only when "a state or political subdivision shall enact or seek to administer" a change in voting procedures. 42 U.S.C. § 1973(c). Although the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of Section 5, we conclude that these actions do not constitute a change that the state *has enacted or sought* to administer within the meaning of that section. This conclusion is compelled by the language of Section 5, the nature of the approval provisions envisioned by Section 5, and the cases interpreting that section.

We do not dispute that the actions of the three poll commissioners constitute actions of the state for certain purposes . . . But one would not normally conclude that a state "enacts or administers" a new voting procedure *every time a state official deviates from the state's required procedures*.

Even if arguendo the allegations are true, they are all founded on the Texas Election Code which has been cleared, and constitute a deviation from the state's required procedures and not a change sought to be implemented.

If such deviation from the state procedure occurred, then the proper attack on the election is in the form of a state election contest — which is exactly what Petitioner's filed in state court but tried to move it to federal court under the guise of a Section 5 violation. Under Petitioners' theory of the case, all state election contests would automatically be Section 5 Voting Rights Act cases also. This is simply not so.

Furthermore, these same allegations which were the basis of the state election contest have been found by the state court to be untrue. *W.T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District*, 720 S.W.2d 836, (Tex. App. — Texarkana, 1986, writ ref'd n.r.e.)

On its face, neither of the Petitioners' complaints have presented any Section 5 coverage question that would require the convening of a three-judge court and were, therefore, properly dismissed for failure to state a claim for which relief can be granted.

III. TEX. REV. STAT. ANN. ART. 717m-1 DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The claim regarding the constitutionality of art. 717m-1 is wholly frivolous and without merit for, as stated in *Backus v. Spears*, 677 F.2d 397, 399 (4th Cir. 1982):

A claim is insubstantial if prior Supreme Court decisions "inescapably render the claim frivolous," *Goosby v. Osser*, 409 U.S. 512, 518, 93 S.Ct. 854, 859, 35 L.Ed.2d 36 (1973).

The constitutionality of art. 717m-1 was placed before this Court in the direct appeal from state court of *City of Austin v. Asmussen*, Cause No. 14,267, in the Court of Appeals for the Third Supreme Judicial District of Texas,

at Austin, writ ref'd n.r.e. (Tr. Vol. 1, p. 128) (attached hereto as Appendix D). The appeal was dismissed for want of a substantial federal question at 106 S.Ct. 35 (1985). Such a dismissal of a state court appeal is a decision by the Supreme Court on the merits. *Hicks v. Miranda*, 95 S.Ct. 2281 (1975).

The *Asmussen* court predicated its decision on the fact that:

First, the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second, if the bond is imposed, an appeal from that determination is available.

Contrary to Petitioners' assertion at page 37 of their Petition, art. 717m-1 has also been declared constitutional by the Supreme Court of Texas in *Buckholts Independent School District v. Glasser*, 632 S.W.2d 146 (Tex. 1982) which stated at page 149 of the opinion:

The taxpayers' basic right to prosecute a lawsuit does not insulate them from damages caused to the public agency if their suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction. . . . it was not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for the damages accruing solely because of the pendency of the suit, to be paid *only if* the contestant should be *unsuccessful* in the suit. We agree with the trial court's determination that a legislative purpose enacting the statute was to stop "the age old practice of allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit." We find no denial of due process in the legislature's provision of a bond for damages to stop the abuse.

It was again addressed and held constitutional in *Rio Grande Valley Sugar Growers v. Attorney General*, 670 S.W.2d 399 (Tex. App. — Austin 1984, writ ref'd n.r.e.).

Petitioners totally disregard these recent decisions and instead rely solely on the 1978 district court decision in *Pine Township Citizens Association v. Arnold*, 453 F.Supp. 594 (W.D. Penn — 1978), which is clearly distinguishable from the present case. It involved a state statutory requirement for a rather substantial bond to be posted by the Petitioner from any zoning decision *regardless of the merits of the appeal*. The only holding made by the court was that the case did present a federal question which required the convening of a three-judge court to determine the issue. The court carefully noted that the Supreme Court had not decided that issue or a similar issue. In the present case the U.S. Supreme Court has decided that the bond requirements of art. 717m-1, the statute in question, does not present a substantial federal question. Also, as both the *Buckholts* and *Asmussen* decisions pointed out, the bond is *only* required when the opposing party cannot show merit to its case.

Petitioners were given an opportunity to show some merit to their case at the bond hearing, but having failed to do so, were ordered to post a bond and were dismissed when they did not post the bond. Further, the Texarkana Court of Appeals stated:

Petitioners were afforded a hearing on the feasibility of a bond being required, yet there has been no evidence brought forward here tending to show that they are indigent and no claim of indigency is raised here.

W.T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District, supra, 720 S.W. 2d at 838. (Attached hereto as Appendix E).

This holding of the Texarkana court is contrary to Petitioners' allegations at p. 38 of their Brief that there "never was a hearing on the merits before the bond was set." Nor is this holding in accord with Petitioners' allegation at page 37 of their Brief that they were "unable" to post the bond.

IV. PETITIONERS HAVE NOT STATED A CAUSE OF ACTION UNDER ANY OTHER SECTION OF THE VOTING RIGHTS ACT OR THE FIFTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Petitioners' pleadings are ambiguous at best. They reference that the case is brought pursuant to the Fifteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1971 and § 1973(c); however, neither complaint contains any of the allegations necessary to support such a claim. The pleadings contain nothing more than a blanket allegation that Petitioners rights have been violated. Petitioners' Brief also contains nothing more than a blanket statement that their pleadings did state a cause of action under the Voting Rights Act and the Fifteenth Amendment to the U.S. Constitution. Their Brief contains no discussion of the allegations that support such a cause of action.

One of the fundamental problems with Petitioners' pleadings is that they fail to allege that Petitioners, or any of them, were actually denied the right to register or to vote, based on their race, color or previous condition of servitude. They fail to allege in what manner Petitioners were denied, if in fact they were denied, the right to register or to vote. They also fail to allege discriminatory intent on the part of the school district regarding the manner in which the elections were conducted. Without the requisite allegations of racial discrimination there is no Fifteenth Amendment violation. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960).

These same allegations are also essential for a violation of Section 2 of the Voting Rights Act since that Section is parallel with the Fifteenth Amendment and has no different effect than the Fifteenth Amendment. *City of Mobile Ala. v. Bolden*, 446 U.S. 55, 60, 100 S.Ct. 1490, 1496 (1980). Equally, a violation of 42 U.S.C. § 1971, by its plain language, involves the same type of racial discrimination. *Kirksey v. City of Jackson, Miss.*, 663 F.2d 659 (5th Cir. 1981).

As stated in *Webber v. White*, 422 F.Supp. 416, 429 (1976):

Pleadings that do nothing more than track the statutes on which they attempt to base a claim are not well pled. Such language constitutes unsupported legal conclusions cast in the form of factual allegations; *Wright & Miller*, supra, § 1357 at 594-596 & n. 48-57, and pleadings that rely on such language fail to state a cause of action.

Although a mere recitation that a plaintiff is a member of a minority race is insufficient, in most cases, to raise the issue of racial prejudice; Petitioners have not even pled the racial status of the Plaintiffs in either of their pleadings. See *Webber v. White*, supra, 422 F.Supp. 416, 429. The hearing on March 5, 1986, at which Petitioner Carrington testified disclosed that he and Petitioners Burns and Stegall are white and that Petitioners Turner and Sams are Blacks who were invited to join in the suit by Petitioner Carrington. Petitioners Turner and Sams joined the case was because of their unhappiness over the school system — there was no mention of any problems with the election. (Tr. Vol. 1, p. 19-22)

Neither of Petitioners' Complaints stated a valid cause of action for which relief can be granted. They are nothing

more than an attempt to have a state court election contest heard in federal court because it will take longer and thereby give them time to pursue their deannexation attempts. They have pled no set of facts which, if true, would entitle them to the relief they have requested. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Therefore, the District Court properly exercised its authority to dismiss Petitioners Complaints and the Fifth Circuit correctly affirmed the decision.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

MARY MILFORD,

Counsel of Record

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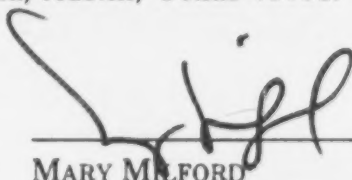
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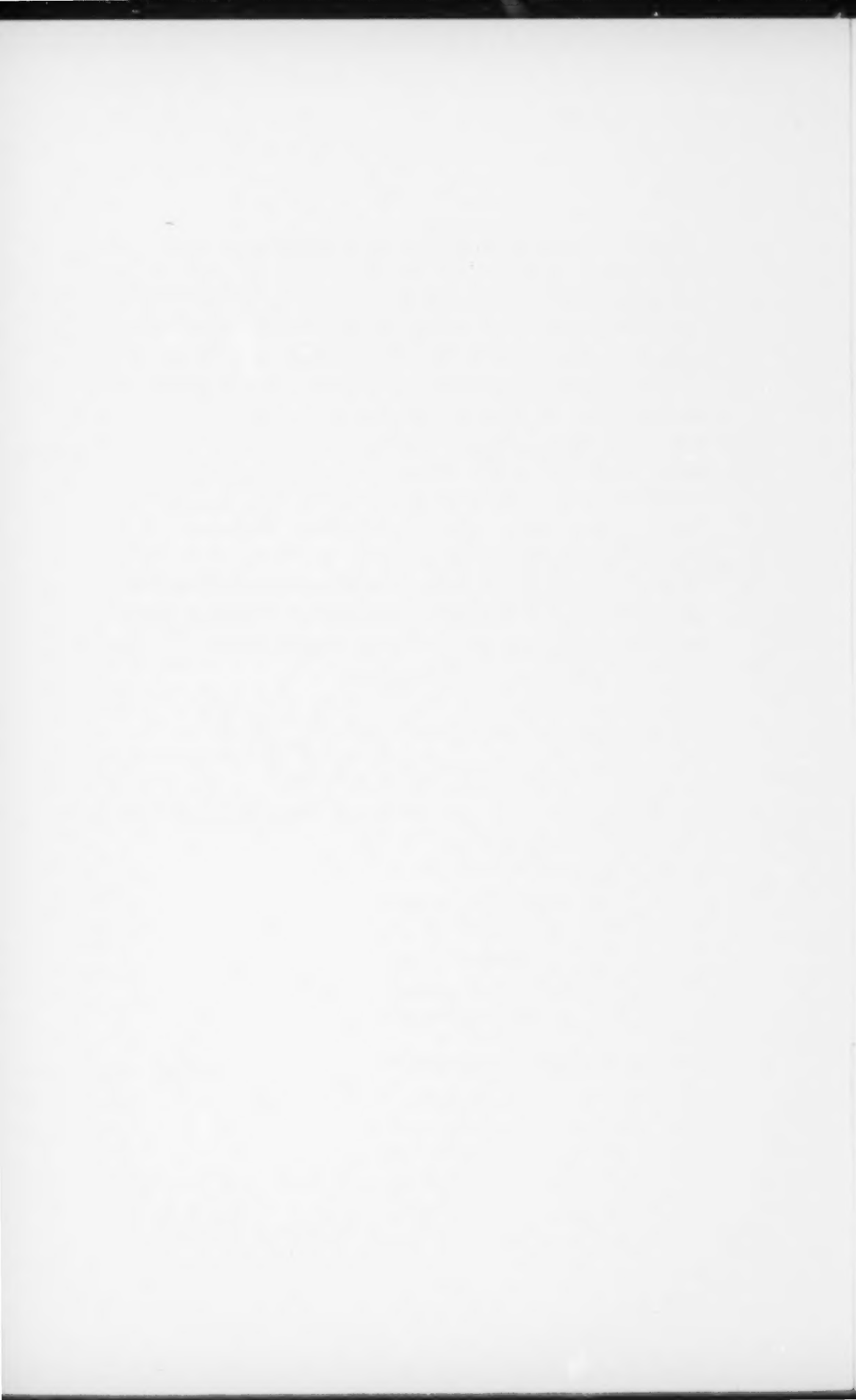
CERTIFICATE OF SERVICE

I, Mary Milford, counsel of record for Respondent Delmar-West Lamar Consolidated Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondents' Brief in Opposition to Petition for Certiorari on all parties required to be served, by depositing three copies of Respondents' Brief in Opposition to Petition for Certiorari in the United States mail, on this 12 day of March, 1987, with first-class postage, addressed to Mr. Frank Moore, Attorney at Law, 41 West Side Square, Cooper, Texas 75432, counsel of record for the Petitioners, and to Mr. Leroy Grawunder, Assistant Attorney General, 201 Barton Springs Road, Austin, Texas 78701.

A handwritten signature in dark ink, appearing to read 'Milford', is written over a horizontal line.

MARY MILFORD

Counsel of Record for Respondents



A-1

FILED
U S District Court
Eastern District of Texas
March 25, 1986
Murray L. Harris, Clerk
By Deputy Shirley Davis

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION**

W. T. "BUTCH" BURNS, et, al.,
Plaintiffs
v.

DELMAR-WEST LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et. al.,
Defendant

CIVIL ACTION NO. P-86-10-CA

ORDER

On the fifth day of March, 1986 came on to be heard Plaintiffs' Application to Convene a Three-Judge Court and Application for a Temporary Restraining Order and Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Under Rule 12(b)(6) of the Fed.R.Civ.P. The Court, after considering the pleadings, briefs and arguments of counsel, is of the opinion that the Application to Convene a Three-Judge Court should be denied, that the Temporary Restraining Order heretofore entered be dissolved, that the Application for a Temporary Restraining Order be denied, and Defendant's Motion to Dismiss be granted.

On February 11, 1986, Plaintiffs W. T. "Butch" Burns, Ted Carrington and Dwight Stegall filed a complaint in this Court against Delmar-West Lamar Consolidated Independent School District. This complaint, entitled Suit Under Declaratory Judgment Act to Declare State Statute Unconstitutional and to Enjoin Delmar-West Lamar Consolidated School District From Further Action for Violation of Voting

Rights Act Until Determination of State Statutes and Rights of Plaintiffs Are Determined, alleged jurisdiction under "1. 42 USC §1971 Voting Rights Act of 1965; 2. 28 USC §2201 Declaratory Judgment Act; 3. U. S. Constitution. Amendments #1, #5 and #14" and sought a determination that a Texas statute (VACS 717m-1) is unconstitutional because of its provisions that a state court could require the posting of a bond by the Plaintiffs in order for them to proceed in a State court proceeding in the contest of the validity of bonds authorized by a bond election. Plaintiffs allege that if such bond was required of the Plaintiffs it would be a denial of due process under the First, Fifth and Fourteenth Amendments of the Constitution of the United States. Plaintiffs further allege that the Defendants failed to get approval of the bond election from the United States Justice Department and that the election therefore violated the Voting Rights Act.

Simultaneously the Plaintiffs filed an Application for Temporary Restraining Order seeking a temporary restraining order and permanent injunction from this Court to restrain and enjoin the Defendant from taking any further action in a suit in the District Court of Lamar County, 62nd Judicial District of Texas (styled Ex Parte Delmar-West Lamar Independent School District, No. 51980 on the docket of such court) which had been filed by the Defendant seeking a declaratory judgment that bonds authorized by a vote of the electorate held on November 2, 1985 are valid. On February 12, 1986, a hearing was held on Plaintiffs' Application for a Temporary Restraining Order and the Court finding that the Defendant was a political subdivision of the State and subject to the provisions of the Voting Rights Act; that the bond election was subject to preclearance under the Voting Rights Act; and that the Attorney General of the United States had not precleared such bond election as of February 12, 1986, a temporary restraining order was issued restraining the Defendant as requested by the Plaintiffs and setting a hearing for February 21, 1986 on Plaintiffs' motion for a preliminary injunction. The hearing was held on February 21, 1986 and the matter was taken

under advisement by the Court and the temporary restraining order continued until a ruling by the Court.

On February 21, 1986 the Plaintiffs in Cause No. P-86-10-CA together with Roy L. Turner and Eddie L. Sams filed a complaint against Murry Winnie, the superintendent of schools and the school board members of the West Lamar Independent School District on August 10, 1985, the time the consolidation election was held, John Brooks, the superintendent of schools, and the school board of the Delmar Independent School District on August 10, 1985, the time of the Consolidation Election and John Brooks, the superintendent of schools and the school board trustees of the Delmar-West Lamar Consolidated Independent School District on November 2, 1985, at the time the bond election was held. (Civil Action No. P-86-14-CA). This complaint prayed that this Court grant the following relief to the Plaintiffs:

a. Convene a statutory court of Three (3) Judges pursuant to 28 U.S.C., paragraph 2284 and 42 U.S.C., paragraph 1973c;

b. Upon hearing adjudge and declare the elections of August 10, 1985 for the consolidation to be void for failure to secure the preclearance and the Election of November 2, 1985 to be void for failure to secure preclearance and for voting procedure changes that promote discrimination all in violation of the Voting Rights Act of 1965 as amended.

c. Issue a Temporary Restraining Order and a Temporary Injunction to restrain and prevent the defendants, their agents and successors and officers, together with all persons acting in concert with them, from taking any action on the consolidation of the schools or for the issuance of the bonds from November 2, 1985 election.

d. Grant Plaintiffs reasonable attorney's fees and all costs and distributions of this suit and for such other and further relief as made equitable in these premises.

On February 26, 1986 the Court entered an order consolidating the two causes of action for all further proceedings and that the two causes proceed under P-87-10-CA.

**Claims Under
Section 5 of the Voting Rights Act**

Plaintiffs' allegations in support of the claimed violations of 42 U.S.C. §1973(c) center around two elections, the consolidation election of Delmar I.S.D. and West Lamar I.S.D. and the bond election held for the purpose of raising revenue to build a new school.

Title 42 U.S.C. §1973(c) (hereafter referred to as §5 of the Voting Rights Act) requires covered states to obtain approval of certain changes in their standards, practices or procedures with respect to voting. A covered state making a change in its voting procedures subject to the approval requirements must either submit the new procedure to the Attorney General for approval or bring a declaratory judgment action in the United States District Court for the District of Columbia. Texas and its political subdivisions are subject to these approval requirements.

Private parties may seek a declaratory judgment that a State has failed to comply with the provisions of §5 of the Voting Rights Act. *Allen v. State Board of Elections*, 89 S.Ct. 817, 827 (1969). They may bring this action in any United States District Court over which three judges shall preside to determine the coverage issue of the asserted claim. If the three-judge court declares the complained of action to be covered by the approval requirements and the plaintiff proves that the State has failed to submit the covered enactment for approval, then the private party has standing to obtain an injunction against further enforcement. *Allen V. State Board of Elections*, 89 S.Ct. at 826, *supra*. Under no circumstances would a three-judge court have authority to declare the elections which are the subject of plaintiff's complaints void based on §5 of the Voting Rights Act.

The single-judge district court to whom the request for a three-judge court is made has authority to determine if a three-judge court is required. 28 U.S.C. §2284(b)(3). While it is true that coverage questions must be determined by a

three-judge court, *Allen v. State Board of Elections*, 89 S.Ct. at 830, supra, "a three-judge court is not required if the claim is wholly insubstantial or completely without merit. In such a case the single-judge court may properly dismiss the claim." *United States v. Saint Landry Parish School Bd.*, 601 F.2d 859, 863 (5th Cir. 1979).

Specifically, the complaints before the Court allege that the Defendants failed to submit the elections for approval prior to the holding of the elections and failed to follow procedures prescribed by the Texas Election Code. In Defendant's Motion to Dismiss and Original Answer in Cause No. P-86-14-CA is a letter, attached as Exhibit "A" and dated March 3, 1986, from the Justice Department which reads:

"This refers to the procedures for conducting the November 2, 1985, special election and the use of a non-resident absentee election clerk for that election by the Delmar-West Lamar Consolidated Independent School District in Fannin and Lamar Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on February 14, 1986.

The Attorney General does not interpose any objections to the changes in question."

In the same motion is a letter, attached as Exhibit "C" and dated February 7, 1986, from the Justice Department which reads:

"This refers to the consolidation of the Delmar and West Lamar Independent School Districts; the at-large election of trustees; the procedures for conducting the August 10, 1985, special election; and the bilingual election procedures for the Delmar-West Lamar Consolidated Independent School District in Fannin and Lamar Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on December 9, 1985.

The Attorney General does not interpose any objections to the changes in question."

These two letters clearly establish that both, the elections and the procedures used for conducting the elections, have now been submitted for approval and that the Attorney General interposes no objections.

The Court finds, based solely on the pleadings filed in these causes, that these § 5 claims are completely without merit, that there is no necessity for convening a three-judge court and that the Plaintiffs have failed to state a claim upon which relief can be granted under § 5 of the Voting Rights Act.

Claim Under § 1971 of the Voting Rights Act

Section 1971(a) provides in pertinent part that "all citizens . . . shall be entitled or allowed to vote . . . without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 42 U.S.C. § 1971(a)(1). Actions of state officials in conducting an election constitute actions of the state within the meaning of this section. 42 U.S.C. § 1971(c); see *Toney v. White*, 476 F.2d 203 (5th Cir. 1973).

The allegations in the complaints before this Court merely state Plaintiffs' rights under § 1971(a) have been denied, and then track the language of the statute. "Pleadings that do nothing more than track the statutes on which they attempt to base a claim are not well plead. Such language constitutes unsupported legal conclusions cast in the form of factual allegations, and pleadings that rely on such language fail to state a cause of action." *Webber v. White*, 422 F.Supp. 416, 429 (E.D. Tx 1976). It must contain allegations which, if proved, would constitute a violation of this section of the Voting Rights Act. This Court finds no such allegations in the complaints before it in these causes.

Fifteenth Amendment Claim

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." U.S. Const. amend. XV, § 1. The United States Supreme Court has repeatedly cited *Gomillion v. Lightfoot*, for the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 97 S.Ct. 555, 563 (1977); *Washington v. Davis*, 96 S.Ct. 2040, 1047 (1976). Absent such invidious purpose there can be no claim under the Fifteenth Amendment.

The complaints before this Court fall short of stating a claim under the Fifteenth Amendment. There are no allegations that anyone was denied the right to register to vote or to cast their ballot in the election process. Nor do they allege any purposeful acts by the election officials or the election process by which anyone was denied the right to vote because of race, color, or previous condition of servitude.

Pendent State Claims

Plaintiffs' have alleged in their complaint numerous violations of the Election Code of the State of Texas, but such complaints reveal that the Plaintiffs currently have a suit pending in a State district court on the identical state claims raised here. This Court finds no authority under the anti-injunction statute 28 U.S.C. § 2283 by which the Court could grant the relief sought by Plaintiffs. That statute prohibits a court of the United States from enjoining proceedings in a State court except where necessary in aid of its jurisdiction or to protect or effectuate its judgments. These state claims do not come within either of the exceptions in 28 U.S.C. § 2283.

In *United Mine Workers of America v. Gibbs*, 86 S.Ct. 1130 (1966) the Court drew a fine distinction between power and discretion of a federal court to entertain a pendent claim. It defined power very broadly, but then identified a number of

factors that the court must consider in exercising its discretion whether to hear the pendent claim. On the question of power to hear the pendent claim, the Court said that if the pleadings disclose a substantial federal claim, there is power to hear pendent claims that "derive from a common nucleus of operative fact" and that if the claims are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of America v. Gibbs*, 86 S.Ct. at 1138, *supra*. Thus if the federal claim is too insubstantial to be the basis for federal question jurisdiction, there can be no pendent jurisdiction of other claims. *Junker v. Crory*, 650 F.2d 1349, 1357 (5th Cir. 1981).

If it is determined by a court that it has the constitutional power to hear the pendent claim it then turns upon the court's discretionary power to entertain the claim. The Court in *Gibbs* announced flatly that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," *United Mine Workers of America v. Gibbs*, 86 S.Ct. at 1139, *supra*, and described the relevant considerations of judicial economy, convenience and fairness to litigants in the exercise of that discretion.

The Court finds the federal claims to be insubstantial and therefore is without the constitutional power to entertain the pendent claims.

Plaintiffs' Other Claims

Plaintiff is seeking a determination by this Court that Article 717m-1 of Vernon's Annotated Texas Statutes is unconstitutional on the grounds that it denies them due process in their State court hearings to be de-annexed from the consolidated school district. This statute has been heretofore declared constitutional by the Supreme Court of Texas in *Buckholts ISD v. Glaser*, 632 SW2d 146 (Tex. 1982). There the Court said there can be no denial of due process in requiring a bond in connection with challenge to a bond issue election, especially where taxpayers are required to post the bond only if they fail to show entitlement to a temporary injunction. Furthermore, the Supreme Court of the United States in dismissing the appeal in *Asmussen v. City*

of *Austin, Texas, et al.*, 106 S.Ct. 35 (1985) held that there was want of a substantial federal question in the application of the bond provision of Article 717m in a State court proceeding.

The Court has considered whether Plaintiffs' complaint contains sufficient allegations to support a claim under § 2 of the Voting Rights Act or under the First and Fifth Amendments to the Constitution of the United States and finds that the complaint is insufficient in this respect.

It is, therefore, ORDERED that the Temporary Restraining Order entered on February 12, 1986, be and the same is hereby, dissolved.

It is further ORDERED that Plaintiffs' Application for Injunctive Relief be, and the same is hereby, denied.

It is further ORDERED that Defendants' Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for Failure to State a Claim Upon Which Relief May be Granted, be and the same is hereby GRANTED and this cause is hereby dismissed.

Signed this 20th day of March, 1986.

/s/ PAUL BROWN

United States District Judge



B-1

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 86-2267

W. T. "BUTCH" BURNS, et al.,

Plaintiffs-Appellants,

v.

DELMAR WEST-LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants-Appellees,

STATE OF TEXAS,

Intervenor-Appellee.

**Appeal from the United States District Court
For the Eastern District of Texas
(Docket No. P-86-10-CA c/w P-86-14-CA)**

(November 12, 1986)

Before THORNBERRY, DAVIS and HILL,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 47.6.



TEX. REV. CIV. STATS. ANN. — Art. 717m-1**Bond**

Sec. 8. At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing party or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court shall then issue an order directed to the opposing party or intervenor, which order, together with a copy of the motion, shall be served on the opposing party or intervenor, or on his attorney of record, personally or by registered mail, requiring the opposing party or intervenor to appear at the time and place, not sooner than 5 nor later than 10 days after entry of the order, as the court may direct, and show cause why the motion should not be granted. Motions with respect to more than one opposing party or intervenor may be heard together if so directed by the court. Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court in its discretion may receive evidence at the hearing or any adjournment with respect to the amount of the damages and costs, which shall include but not be limited to anticipated increases in interest rates and in construction and financing

costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings, but may fix the amount of the bond to be posted by a particular opposing party or intervenor only if a motion as described in this section was made and granted as to the opposing party or intervenor. In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court, unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised by an opposing party or intervenor as to whom no motion was made hereunder. An order of the court fixing the amount of the bond to be posted by an opposing party or intervenor or denying the motion of a public agency or dismissing a party for failure of file a bond may be appealed as provided in Section 9 of this Act. The court to which any appeal is taken may modify the order of the lower court and may enter the modified order as the final order. In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised in the proceedings by an opposing party or intervenor as to whom no motion was made hereunder. It is further provided that, on motion of the public agency, the court shall proceed without delay to hearing and trial on the merits of the public agency's petition, regardless of the pendency of an appeal from any order entered pursuant to this section.

Appeal

Sec. 9. Any party to the cause, whether the public agency, a defendant, intervenor, or otherwise, dissatisfied with any order entered paramount to Section 8 of this Act, or with the judgment in the declaratory judgment action, may appeal therefrom to the appropriate court of civil appeals after the entry of the order or judgment, or the order or judgment shall become final. The appeal shall take priority over all other cases, causes, or matters pending in the court of civil appeals, except habeas corpus, and it shall be mandatory that the court of civil appeals assure the priority and act thereon and render its final order or judgment therein with the least possible delay. The Supreme Court shall have authority to review, by writ of error or other authorized procedure, all questions of law arising out of the orders and judgments of the courts of civil appeals in the cases, in the manner, time, and form applicable in other civil causes where a decision of the court of civil appeals is not final, but any such review shall take priority over all other cases, causes, or matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment therein with the least possible delay. Also, Rule 499a, Texas Rules of Civil Procedure, shall apply to proceedings in the district court, but any direct appeal thereunder shall take priority over all other cases, causes, and matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment with the least possible delay.



D-1

**IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AUSTIN**

No. 14,267

THE CITY OF AUSTIN,
Appellant
vs.

ROBERT ASMUSSEN, et al.,
Appellees

**FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 331ST JUDICIAL DISTRICT NO.
359,009, HONORABLE PAUL R. DAVIS, JR.,
JUDGE PRESIDING**

Per Curiam

The only question presented by this appeal is wheather the trial court erred in refusing to set a damage bond under the provisions of § 8 of Tex. Rev. Civ. Stat. Ann. art. 717m-1 (Supp. 1984). This statute, hereinafter referred to as "the Act," provides for prior judicial validation of securities to be issued by public agencies.

In March 1984, the City of Austin brought suit, in accordance with § 2 of the Act, seeking a declaratory judgment

validating the prospective issuance and delivery of combined utility systems revenue bonds in the amount of \$605,000,000, as previously authorized by an ordinance adopted by its city council. As allowed by § 7 of the Act, appellees Robert Asmussen and thirty-seven other interested persons intervened in opposition to the City's request for validation. The Attorney General of Texas was made a party to the suit, in accordance with § 4 of the Act.

Shortly after the intervention of appellees, the City filed a motion to require a bond of the intervenors, as provided for under § 8 of the Act. After a pretrial hearing, the trial court denied the City's motion, stating in its order:

In denying the Motion for Bond, the Court does not find that Intervenorors have made a showing of probable cause under Article 717m-1, Section 8, but instead, finds that the amount of damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of Intervenorors (as opposed to the delay inherent in the validation suit and bond issuance process) cannot be determined with sufficient exactitude to permit the setting of a bond at this time.

Contemporaneously with the hearing on the merits, but prior to the entry of judgment, the City filed a second motion to require bond of the intervenors. After a hearing, this motion was also denied. This appeal, authorized by § 8 of the Act, results.¹

By one point of error, the City complains of the trial court's refusal to set a bond. In response, the intervenors/appellees argue that in the absence of findings of fact and conclusions of law, which were not requested by the City, the order denying bond should be affirmed upon any theory of law finding support in the evidence. They then suggest that the order may be sustained for any of the following reasons: (1) there is an absence of credible evidence that (a) there will be any prospective damage to the City, (b) of any

¹The intervenors' appeal from the trial court's judgment validating the bonds is pending before this Court in a separate cause.

specific or particular amount, (c) attributable to any delay caused by the continued participation of the appellees in the proceeding; (2) because one of the appellees is indigent, no damage bond under the Act may be imposed as to any of them; and (3) the City was not entitled to make a second request for the bond.

For purposes of this opinion, we will assume that appellees' assertion as to the effect of no findings of fact and conclusions of law is correct. After a careful review of the record, however, we conclude that the court below erred in refusing to set a bond under § 8 of the Act.² Accordingly, we will modify the trial court's order to require a bond of appellees.

²Article 717m-1, § 8 provides, in relevant part:

At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing party or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition.

* * * *

Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court in its discretion may receive evidence at the hearing . . . with respect to the amount of the damages and costs, which shall include but not be limited to anticipated increases in interest rates and in construction and financing costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings . . .

We begin our analysis by examining the nature and purpose of art. 717m-1, as explained by the Supreme Court in *Buckholts Independent School District v. Glaser*, 632 S.W.2d 146, 149 (Tex. 1982):

The taxpayers' [, property owners', citizens', or other interested persons'] basic right to prosecute a lawsuit does not insulate them from damages caused to the public agency if their suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction. In these bond cases, the mere existence of the suit acts as a temporary injunction. Bonds cannot be issued because of the existence of the suit. While the action is pending, the interest rates and construction costs may increase. . . . Since the mere existence of such a suit is likely to cause damages, it was not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for the damages accruing solely because of the pendency of the suit, to be paid *only* if the contestant should be *unsuccessful* in the suit. We agree . . . that a legislative purpose in enacting the statute was to stop 'the age old practice allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit.' [emphasis in original]

In the present cause, it is undisputed that appellees did not show themselves entitled to a temporary injunction to block issuance of the bonds. In fact, the order denying the City's second request for bond was signed by the trial court on the same day it entered judgment validating the bonds sought to be issued.

This being the case, we conclude that unless the City completely failed to show any likelihood of damage due to delay caused by appellees' continued participation in the suit, the trial court was required to set a bond under the Act. Although the calculation of prospective damages, especially based upon rising interest rates, is by its very nature somewhat speculative, the Act explicitly authorizes consideration of such a possibility, and it obviously does not require, to support the imposition of a bond, the certainty or the

particularity that a suit on the bond itself would require. We do not find such an absence of proof of the likelihood of damages.

Briefly stated, the City's evidence indicated that of the \$605-million issue authorized by ordinance, there was some likelihood that \$200 million, would, but for this litigation, be issued within one year's time; that in the opinion of the City's experts the interest rates on municipal bonds of this type were likely to rise at least $\frac{1}{2}\%$ and as much as 1% during the next year; that a year's delay due to any appeal prosecuted by appellees to this Court, the Supreme Court of Texas, and the U.S. Supreme Court would not be unusual; and that, assuming a twenty-year average life of the \$200 million in bonds, the loss to the City in the event of a $\frac{1}{2}\%$ increase in interest rates would be approximately \$28 million over the life of the bonds. Without objection, the City produced evidence that a challenge directed toward an earlier bond issue of the City had consumed approximately a year, despite an accelerated appellate schedule. See *Bischoff v. City of Austin*, 656 S.W.2d 209, 662 S.W.2d 156 (Tex. App. 1983, writ ref'd n.r.e.), appeal dism'd and cert. denied, ___ U.S. ___, 104 S.Ct. 1699 (1984).

Viewed in its most favorable light, appellees' controverting evidence will not support the trial court's order. It is not enough to show, as appellees argue to this Court, that there are many opinions regarding the rise and fall of interest rates, or that it is possible interest rates may fall as well as rise in the future. Further, appellees' assertion that the proceeds from the present bond issue in dispute will not be needed by the City during the next year, due to the removal of legal impediments to the issue challenged in *Bischoff*, misses the mark. The bonds at issue in *Bischoff* are specifically earmarked for payments to meet the City's obligations as a participant in the South Texas Nuclear Project, while the bonds at issue in this appeal are broader in purpose. They are specifically identified by the ordinance as funds for "improving and extending the [City's] Electric Light and Power System. . . ." It is rather obvious that while the bonds at issue in *Bischoff* may supply the funds for the City's

participation in that project for a year, the bond issue impeded by this suit includes funds for the general maintenance and extension of the City's electric system in a period of rapid growth and improvement.

We also reject appellees' contention that a damage bond may not be required because one of their number is indigent. The principal that indigents, as a matter of due process and equal protection, may not be denied access to the courts for the assertion of basic rights, *Boddie v. Connecticut*, 401 U.S. 371 (1971), is not without limitation. In reviewing the propriety of bond requirements, as applied to indigents, the test is whether there is a rational justification for the imposition of the bond. See *U.S. v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973). A statute imposing a bond requirement will be upheld if it rationally furthers a legitimate state interest.

In this case, a damage bond is required under § 8 of the Act

to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition.

As such, this provision furthers the legitimate state interest of providing for the funding of public improvements and projects without burdensome financial penalty to the public due to delay if the opponent's challenge should prove meritless. As required by *Kras* and *Ortwein*, the indigent litigant possesses alternate methods of obtaining available relief, so that his right to challenge the issuance of securities is not strictly conditional upon the posting of the bond. First, the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second, if a bond is imposed, an appeal from that determination is available.

Moreover, the bond requirement is a reasonable procedural provision to protect against significant financial loss to the City. Because the bond requirement is uniformly and nondiscriminatorially applied to all intervenors under the Act, indigent and non-indigent alike, there is no violation of the indigent's rights to equal protection just because the continuation of the proceeding is conditioned upon the posting of a bond. See *Lindsey v. Normet*, 405 U.S. 56 (1972); *Ross v. Brown Title Corp.*, 356 F.Supp. 595 (E.D.La.), *aff'd*, 412 U.S. 934 (1973). In this context, the concept of equal protection requires that indigents have "equal" access to the courts; it does not require that they have rights superior to those of non-indigents.

We also find without merit appellees' contention that the City was not authorized to seek the imposition of a damage bond a second time during the pendency of the suit below. They cite no authority for this proposition, and the contention is not consistent with motion practice relating to relief ancillary to the merits of a cause. An interlocutory order is not *res judicata* of the issue it addresses. During the pendency of a cause, a trial court retains the power to modify or set aside its interlocutory orders, and to enter new orders, whether requested to do so by a party or not. *Kone v. Security Finance Co.*, 313 S.W.2d 281, 286 (Tex. 1958); *Texas Crushed Stone Co. v. Weeks*, 390 S.W.2d 846, 849 (Tex. Civ. App. 1965, writ *ref'd n.r.e.*).

Accordingly, we here modify the order of the trial court to require a damage bond of all of the appellees. In setting the amount of the bond, we have taken into account the lowest potential for loss supported by the record, referable to the likely period of delay occasioned by the continuation of this proceeding on the merits, reduced to present value. We are of the opinion that a bond in the amount of \$2,000,000 will be sufficient to cover all damages and costs attributable to such delay. In accordance with § 8 of the Act, unless the bond, with sufficient surety, is filed in this Court within ten days from the date of this opinion and accompanying order, the cause on the merits now pending in this Court will be

dismissed. If the bond is filed, any appellee not appearing and signing as a principal thereon will be dismissed from the proceedings.

Because this opinion presents no question or application of any rule of law of interest or importance to the jurisprudence of this State, it is ordered not published. Tex. R. Civ. P. Ann. 452 (Supp. 1984).

[Before Justices Shannon, Powers and Brady]
Modified to Require Bond
Filed: October 31, 1984

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W. T. "BUTCH" BURNS, TED CARRINGTON
AND DWIGHT STEGALL,

Appellants,

v.

DELMAR-WEST LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,

Appellee.

No. 9511.

**Court of Appeals of Texas,
Texarkana.**

Oct. 21, 1986.

Rehearing Denied Nov. 18, 1986.

In school bond election contest, the 62nd Judicial District Court, Lamar County, Paul Banner, J., granted school district's motion that taxpayers be required to post bond and subsequently dismissed taxpayers when they failed to do so. Taxpayers appealed. The Court of Appeals, Cornelius, C.J., held that: (1) taxpayers' failure to post bond or to appeal order requiring them to do so in accordance with statutory requirements deprived Court of jurisdiction over taxpayers' appeal, and (2) taxpayers were not deprived of due process by bond requirement, in absence of claim or evidence of indigency.

Appeal dismissed.

1. Schools — 97(4½)

Taxpayers' failure to post bond in school bond election contest or to appeal trial court order requiring them to do so, in accordance with statutory requirements, deprived Court of Appeals of jurisdiction to consider their appeal following dismissal. Vernon's Ann. Texas Civ. St. art. 717m-1, § 8.

2. Constitutional Law — 274.2(1)

Taxpayers were not deprived of due process in their school bond election contest by requirement that they post bond before final determination of merits and as prerequisite to appeal, in absence of claim or evidence that taxpayers were indigent. U.S.C.A. Const. Amends. 5, 14.

Frank D. Moore, Cooper, Mary Milford, Law Offices of Earl Luna, P.C., Dallas, for appellants.

Leroy Grawunder, Jr., Asst. Atty. Gen., Public Finance Section, Austin, for appellee.

CORNELIUS, Chief Justice.

This is a school bond election appeal. Because the appellants have failed to follow the mandates of Tex.Rev.Civ.Stat.Ann. art. 717m-1, § 8 (Vernon Supp.1986), we dismiss the appeal for want of jurisdiction.

In response to the appellant taxpayers' election contest, the appellee school district answered and filed a separate suit seeking a declaratory judgment that the bond proceedings were valid pursuant to Tex.Rev.Civ.Stat.Ann. art. 717m-1 (Vernon Supp. 1986). The two causes were consolidated. The trial court then granted the school district's motion to require the appellants to post bond as authorized by Article 717m-1, § 8, and entered an order to this effect dated April 8, 1986. The appellants were dismissed for failure to post the bond on April 22. It is from the April 22 dismissal that the appellants bring this appeal.

Article 717m-1, § 8, in relevant part reads as follows:

In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings,

[1] Appellants neither posted the bond nor appealed from the April 8 order requiring such bond. Article 717m-1, § 8, therefore operates to deprive this Court of jurisdiction to consider the appellants' contentions. *Buckholts Independent School District v. Glaser*, 632 S.W.2d 146 (Tex.1982); *Rio Grande Valley Sugar Growers v. Attorney General*, 670 S.W.2d 399 (Tex.App.-Austin 1984, writ ref'd n.r.e.).

Appellants contend, however, that the statute unconstitutionally deprives them of due process because it requires the posting of a bond before a final determination of the merits and as a prerequisite to an appeal, even though the plaintiffs may be unable to make the bond.

[2] The constitutionality of these provisions has been upheld against similar attacks. *Buckholts Independent School District v. Glaser*, supra; *Rio Grande Valley Sugar Growers v. Attorney General*, supra. The statute does not expressly deny a waiver of the bond for indigents. *Buckholts Independent School District v. Glaser*, supra. Appellants were afforded a hearing on the feasibility of a bond being required, yet there has been no evidence brought forward here tending to show that they are indigent and no claim of indigency is raised here.

Appellants also argue that the judgment is void, and for that reason it can be attacked on the merits here, even though they did not avail themselves of the right to appeal the judgment in the manner provided by the statute. They base their argument on the contention that the school district was not a legal entity and therefore could not call a valid election.

As the court had jurisdiction of the proceedings and the parties below, its judgment was not void. If, as appellants urge, the judgment was erroneous, their remedy was to appeal by following the statute. Failing to do so, they cannot now challenge the issues which were or could have been raised in the proceedings below. *Burris' Estate v. Associated Employers Insurance Co.*, 374 S.W.2d 223 (Tex.1963); *Ex*

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parte Sutherland, 515 S.W.2d 137 (Tex.Civ.App.-Texarkana 1974, writ *dism'd*); 48 Tex.Jur.3d *Judgments* § 277 (1986).

The appeal is dismissed at appellants' costs.

